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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

TARRANT COUNTY HOSPITAL DISTRICT, *Petitioner*

v.

THE HONORABLE WILLIAM L. HUGHES, JR.,
Respondent

Petition for Writ of Certiorari to the Court of Appeals for the Second Appellate District of Texas

TIM CURRY
Criminal District Attorney
Tarrant County, Texas

WILLIAM VAN THOMPSON, JR.
Assistant Criminal District Attorney
Counsel of Record

Criminal Justice Building
200 West Belknap
Fort Worth, Texas 76196-0201
817/334-1233

Attorneys for Petitioner

Fort Worth Brief Printing Co., 610 South Jennings Avenue, Fort Worth, Texas 76104 Phone 817-332-4070

QUESTION PRESENTED

1. Whether the identities of voluntary blood donors are constitutionally protected by the right to privacy from discovery in state tort litigation?

LIST OF PARTIES

The parties to the mandamus proceeding below were the petitioner, Tarrant County Hospital District, and respondent, Honorable William L. Hughes, Jr., Judge of the 48th Judicial District Court of Tarrant County, Texas. However, this case arises out of the discovery process in an ongoing state court tort action, No. 48-95022-86, styled *Belinda C. Jackson, Individually And In Behalf Of The Estate Of Tristainne O. Jackson, Deceased, v. Tarrant County Hospital District d/b/a John Peter Smith Hospital*, pending in the 48th Judicial District Court of Tarrant County, Texas, wherein the parties at interest are Belinda C. Jackson, the Estate of Tristainne O. Jackson, plaintiffs, and Tarrant County Hospital District and Dallas Blood Center, defendants.

The Criminal District Attorney of Tarrant County, Texas is required by statute to represent the Tarrant County Hospital District. Art. 4494n, Sec. 12, V.T.C.S., which provides, as here relevant:

> "It shall be the duty of the County Attorney, District Attorney or Criminal District Attorney, as the case may be, charged with the duty of representing the county in civil matters, to represent the Hospital District in *all* legal matters;–" (Emphasis supplied).

The Criminal District Attorney "shall represent Tarrant County in *any* court in which the county has pending business." Tex. Govt. Code Ann. §44.320(a). (Emphasis Supplied). Clearly the instant petition constitutes a legal matter involving the Tarrant County Hospital District.

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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

TARRANT COUNTY HOSPITAL DISTRICT, *Petitioner*

v.

THE HONORABLE WILLIAM L. HUGHES, JR.,
Respondent

Petition for Writ of Certiorari to the Court of Appeals for the Second Appellate District of Texas

Petitioner respectfully prays that a writ of certiorari issue to review the decision and judgment of the Court of Appeals for the Second Appellate District of Texas entered in the above-entitled proceeding on April 9, 1987.

OPINION BELOW

The opinion of the Court of Appeals for the Second Appellate District of Texas is reported at 734 SW2d 675, and is reprinted in the appendix to this petition.

The Supreme Court of Texas has declined to exercise its jurisdiction to review this decision by denying petitioner's motion for leave to file writ of mandamus therein, and has denied petitioner's motion for rehearing by order, dated November 25, 1987. The notices received from the clerk of the Supreme Court reflecting these actions are reprinted in the appendix to this petition.

The order of the 48th Judicial District Court of Tarrant County, Texas, is not reported. It is reprinted in the appendix to this petition.

JURISDICTION

The jurisdiction of this court is invoked under 28 USC §1257(3).

Although the state court tort litigation has yet to be finally decided on the merits, the federal question herein presented has been finally determined in the above-entitled state court mandamus proceedings and later state court review of this federal issue cannot be had whatever the ultimate outcome of the main tort case. Hence, this case is final within the meaning of 28 USC §1257(3). *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 481 (1975); *New York v. Quarles*, 467 U.S. 649, 651 n. 1 (1984).

Mandamus is the appropriate state law remedy to correct an abuse of discretion by the trial court in the discovery process. *State Dept. of Highways and Public Transp. v. Ross*, 718 SW2d 5 (Tex. App.-Tyler 1986, no writ); *Velasco v. Haberman*, 700 SW2d 729 (Tex. App.-San Antonio 1985, no writ). This Court has attached finality for purposes of 28 USC §1257 to state court judgments denying a writ of mandamus. *Pacific Coast Dairy v. Department of Agriculture*, 318 U.S. 285 (1943).

Since the Supreme Court of Texas has declined to exercise its jurisdiction in this proceeding by order, dated October 7, 1987, denying petitioner leave to file writ of mandamus, and by order, dated November 25, 1987, overruling petitioner's motion for rehearing, the reviewable judgment is that previously rendered by the Court of Appeals. *Interstate Circuit, Inc. v. Dallas*, 390 U.S. 676, 678 n. 1 (1968); *Michigan-Wisconsin Pipe Line Co. v. Calvert*, 347 U.S. 157, 160 (1954);

Hammerstein v. Superior Court, 341 U.S. 491, 492 (1951); *Sullivan v. Texas*, 207 U.S. 416 (1908).

In the instant cause Petitioner as custodian of the medical records is entitled to assert the concomitant rights of the third party blood donors whose constitutionally protected right to privacy would be "diluted or adversely affected" if Petitioner's constitutional challenge should fail and their identities disclosed pursuant to the trial court's discovery order. *Carey v. Population Services International*, 431 U.S. 678, 684 (1977); *Craig v. Boren*, 429 U.S. 190, 196 (1976).

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

Amendment XIV, Section 1, of the United States Constitution:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Rule 166b, Sec. 4, Texas Rules of Civil Procedure:

> 4. Protective Orders. On motion specifying the grounds and made by any person against or from whom discovery is sought under these rules, the court may make any order in the interest of justice necessary to protect the movant from undue burden, unnecessary expense, harassment or annoyance, or invasion of personal, constitutional, or property rights. Specifically, the court's author-

ity as to such orders extends to, although it is not necessarily limited by, any of the following:

a. ordering that requested discovery not be sought in whole or in part, or that the extent or subject matter of discovery be limited, or that it not be undertaken at the time or place specified.

b. ordering that the discovery be undertaken only by such method or upon such terms and conditions or at the time and place directed by the court.

c. ordering that results of discovery be sealed or otherwise adequately protected; that its distribution be limited; or that its disclosure be restricted.

STATEMENT OF THE CASE

In March 1986, Belinda Jackson commenced a state tort action in the 48th Judicial District Court of Tarrant County, Texas, styled *Belinda C. Jackson, Individually and In Behalf of the Estate of Tristainne O. Jackson, Deceased v. Tarrant County Hospital District d/b/a John Peter Smith Hospital*, No. 48-95022-86, alleging that Tristainne Jackson, who was born prematurely on February 21, 1983, at John Peter Smith Hospital was given blood transfusions at the hospital which resulted in her having contracted Acquired Immune Deficiency Syndrome (AIDS) causing her death.

During the process of discovery in this suit Plaintiff sought through Request for Production to discover the identities and addresses of all blood donors whose blood had been used in the health care of the deceased. Relator timely filed a Motion for Protective order pursuant to Rule 166b, TEX. R. CIV. P., contending as here relevant, that the information sought was protected from discovery by the constitutional right of privacy of the donors guaranteed by the Constitution of the United States and that failure to maintain the confidentiality would materially adversely affect the medical profession and the

public through reduction of available donors needed to maintain a healthy and effective volunteer blood supply program.

The motion was heard on June 27, 1986, and on October 16, 1986, the trial court overruled the Hospital District's Motion for Protective Order holding in part as here relevant:

> "It is further found that the disclosure of the identity and address of blood donors does not violate the constitutional right to privacy, nor does such disclosure sufficiently threaten institutional and societal interests in maintaining a healthy and effective blood donation program to warrant an order prohibiting the discovery. . . ."
>
> "Plaintiff shall not directly or indirectly contact any "donor" identified through records produced under this order nor undertake further discovery regarding such "donors" until permitted to do so by further order of this Court."

Relator on November 3, 1986, filed a Writ of Mandamus with the Court of Appeals for the Second Appellate District of Texas on October 30, 1986, seeking relief from this Order. On April 9, 1987, the Court of Appeals issued its plurality opinion denying relator the relief sought (one Justice concurring separately and three Justices dissenting).

On April 14, 1987, the trial court issued a Supplemental Order further restricting the disclosure of the blood donor identities "directly or indirectly" to third persons without further order of the court. (This was done to "allay the fears" expressed by the dissenting Court of Appeals Justice.) The parties are to submit a "plan" for further discovery. This Supplemental Order was expressly approved in the Court of Appeals decision on rehearing.

Relator's Motion for Rehearing was denied by the Court of Appeals on August 12, 1987.

Relator applied to the Supreme Court of Texas for leave to file a Writ of Mandamus. This relief was denied on October 7, 1987, and Relator's Motion for Rehearing was denied on November 25, 1987.

HOW THE FEDERAL QUESTION WAS PRESENTED

The constitutional claim to protection from discovery under the right to privacy of the identities of the blood donors was properly raised at every available stage of the legal proceedings in both the state tort case and the ancillary mandamus action in the Court of Appeals and were attempted to be raised in the highest appellate level court in Texas, the Supreme Court of Texas, which refused to exercise jurisdiction.

The Court of Appeals rejected Relator's contention that disclosure of the identities and addresses of the volunteer blood donors would violate their constitutional right to privacy saying:

> "We disagree with the opinions of the Florida courts and hold that the trial court order compelling relator to identify blood donors is not an impermissible violation of their rights to privacy. We further hold that relator has not established a societal interest that overrides the Plaintiff's right to discovery of the blood donors' identities." (734 SW2d at 679).

The Supreme Court of Texas refused to exercise its jurisdiction to review this matter thereby allowing the Court of Appeals decision to stand.

REASONS FOR GRANTING THE WRIT

I.

THE TEXAS COURT OF APPEALS DECISION CONFLICTS WITH THE DECISIONS OF THE HIGHEST COURT OF ANOTHER STATE ON A SUBSTANTIAL FEDERAL CONSTITUTIONAL ISSUE.

A. The Texas Court of Appeals decision fails to protect the federal constitutional right to privacy of the volunteer blood donors.

The issue of the applicability of the federal constitutional right to privacy to maintain the anonymity of volunteer blood donors in civil litigation is not resolved by any decision of the United States Supreme Court. However, the Texas Court of Appeals decision in the instant cause conflicts with one and possibly two highest state court decisions.

In *Rasmussen v. South Florida Blood Service*, 500 So.2d 533 (Fla. 1987), the Supreme Court of Florida affirmed the lower courts' decision (467 So.2d 798) and held that the blood donor's federal constitutionally guaranteed privacy interests as well as society's interest in maintaining a strong volunteer blood donation system outweighed Plaintiff's interest in discovering the names and addresses of blood donors in litigation virtually identical to that in the instant cause. The court therein noted that the question was one of "great public importance" (500 So.2d at 534). The court further recognized that Plaintiff needed more than just the names and addresses of the donors, since his "interest is establishing that one or more of the donors has AIDS or is in a high risk group." (500 So.2d at 537). The court noted that "there is nothing to prevent Petitioner from conducting an investigation without the knowledge of the persons in question" Id. Also considered was the "possibility that a donor's co-workers, friends, employers, and others may be queried as to the donor's sexual prefer-

ences, drug use, or general life-style." The lower court in *Rasmussen* (467 So.2d at 802) had noted:

> "AIDS is the modern day equivalent of leprosy. AIDS, or a suspicion of AIDS can lead to discrimination in employment, education, housing and even medical treatment."

The Court held that, "by the very nature of the case, disclosure of donor identities is 'disclosure in a damaging context' citing *Lora v. Board of Education of City of New York*, 74 F.R.D. 565, 580 (1977), which recognizes that the essential core of this zone of privacy is the right "to prevent disclosure of–identity in a damaging context." The court found that "disclosure of donor identities in any context involving AIDS could be extremely disruptive and devastating to the individual donor." (500 So.2d at 537).

Another highest level state appellate decision involved the attempted discovery of the identity of a potential bone marrow donor. *Head v. Colloton*, 331 NW2d 870, 876 (Iowa 1983). Therein Plaintiff sought discovery of the potential donor's identity under the Iowa Open Records Act, and the Supreme Court of Iowa found such to be protected by the right to privacy.

The Texas decision in the instant case recognizes that a right of privacy exists under both the federal and state constitutions citing *Roe v. Wade*, 410 U.S. 113, 152-53 (1973); *Industrial Foundation of the South v. Texas Industrial Accident Board*, 540 SW2d 668, 678-80 (Tex. 1976); *Ex Parte Shell*, 613 SW2d 255, 265-69 (Tex. 1981) (734 SW2d at 678). The court also recognized that this right extends to personal information citing *Whalen v. Roe*, 429 U.S. 589, 598-600 (1977), and that a court order which compels or restricts pretrial discovery constitutes state action which is subject to constitutional limitation, citing *Seattle Times Co. v. Rhinehart*, 467 U.S. 20 (1984).

Nevertheless, the court expressly disagreed with the Supreme Court of Florida in *Rasmussen* saying that in applying the balancing test of *Nixon v. Administrator of General Services*, 433 U.S. 425 (1977), the interest of Plaintiff outweighed the privacy interests of the volunteer blood donors and societal interests of the public in a strong volunteer blood donation system, which were so carefully protected in *Rasmussen*.

That as in *Rasmussen* Plaintiff herein seeks more than just the names and addresses of the donors and that the trial court's pretrial order contemplates much more is made abundantly clear by the trial court's Supplemental Order issued April 14, 1987, requiring the submission of a discovery plan for "contact, direct discovery and/or testing" of the donors. This Supplemental Order is expressly approved by the Court of Appeals on rehearing (734 SW2d at 684-85). As yet no "plan" has been submitted.

It is far from clear that the restrictions imposed by the trial court against either disclosure of the identities of the donors to third parties or contact with the donors would "allay" the fears that Plaintiff would conduct an investigation outside the knowledge of the donors and question their co-workers, friends, employers, and others concerning the intimate and discreet details of their personal lives, such as the donors' sexual preferences, possible drug use, or general life-style. Common experience teaches that the very asking of these questions is sufficient, especially in today's environment, to destroy the reputations of the donors and to raise the specter of AIDS. That such inquiries or even the potential to be the subject of such an inquiry will serve to deter potential volunteer blood donors is beyond doubt.

B. The Texas Court of Appeals decision fails to recognize that the national public interest in maintaining a safe and adequate volunteer donor blood supply system outweighs a civil litigant's need to discover donor identities.

The implications of this case run far beyond just the interests of the involved individual blood donors and also adversely impact the interests of the volunteer blood donor programs, and, hence, the basic health care interests of the general public.

The balancing test stated in *Seattle Times Co. v. Rhinehart*, supra, and *Nixon v. Administrator of General Services*, supra, requires the weighing of the litigant's interest in disclosure against the privacy interests of the volunteer blood donors and the societal interests of the public in the maintenance of an adequate and safe volunteer blood supply system against disclosure. These latter contrary interests are intimately connected.

The development of an entirely voluntary blood donor supply system is critical to the national goal of the development and maintenance of an adequate nation-wide supply of blood units and components. Department of Health, Education and Welfare, Nation Blood Policy, Department Response to Private Sector Implementation Plan, 39 Fed. Reg. 32, 701, 32, 702 (Sept. 10, 1974):

> "The National Blood Policy thus calls for a pluralistic and evolutionary approach to the solution of blood collection and distribution promblems. It seeks to accelerate development of an all-voluntary blood donor system."

A central goal of the Public Health Service was therein stated to:

> "[E]ncourage, foster, and support efforts to bring into being an all-voluntary blood system and to eliminate

> commercialism in the acquision of whole blood and blood components for tranfusion purposes. The ultimate aims of this policy are improvement in the quality of the supply of blood and blood products –." Id.

The issue of the need for confidentiality of blood donors was considered in Congress. The witnesses included the Commissioner of the Food and Drug Administration and former government health officials as well as representatives from the American Red Cross, the American Association of Blood Banks and the American Blood Resources Association. These witnesses were uniform in their testimony that the consistent policy of blood bank organizations to maintain the confidentiality of information concerning blood donors is critical to the protection of the voluntary blood donation system. Subcommittee on Health and the Environment of the Committee on Energy and Commerce, 99th Cong., 1st Sess. 99-45 (1985), pp. 111-202.

Likewise, recent medical literature recognizes the importance and critical need for confidentiality and privacy:

> "[T]he laboratory has taken the stance that donors have a right to privacy and that confidentiality is essential, and so far the names have been withheld. The decision as to whether the laboratory will be forced by the court to provide the names will have a profound impact upon voluntary donations."

Wyatt, *AIDS: Legal and Ethical Concerns for the Clinical Laboratory*, 4 J. Med. Tech. 108-09 (1987).

In the lower court opinion in *South Florida Blood Service v. Rasmussen*, 467 So.2d 798, 804 (Dist. Ct. App. 1985, aff'd 500 500 So. 2d 533), the court found the need to protect and foster this societal interest:

> "An all-volunteer blood donation system should be encouraged in order to maintain the life and health of individual members of society, and thus, society as a whole. As a corollary, it is in the public interest to discourage any serious disincentive to voluntary blood donation *such as an instrusive probe into the most intimate details of one's life*." (Emphasis Supplied).

The lower court further found:

> "We likewise find the free flow of donated blood of sufficient public importance, when combined with privacy interests of the donors in this AIDS-related litigation, to outweigh Rasmussen's interest in discoverying the names and addresses–. The complete denial of discovery is necessary to ensure the protection of the donors' privacy interests and society's interest in a strong and healthy volunteer blood donation program." Id.

In affirming the Supreme Court of Florida held:

> "Because there is little doubt that the prospect of inquiry into one's private life and the potential association with AIDS will deter blood donation, we conclude that society's interest in a strong and healthy blood supply will be furthered by the denial of discovery in this case." (500 So.2d at 538)

The Court concluded that in balancing these competing interests the "dubious" probative value of the discovery sought with the "potential of significant harm" to the blood donors "far outweighs the Plaintiff's need under these circumstances." Id. These same considerations obtain with full force in the instant cause.

II.

A SUPREME COURT PRECEDENT IS NEEDED TO RESOLVE THE ARISING CONFLICTS ON THIS SUBSTANTIAL FEDERAL QUESTION.

Although written opinions are rarely written on discovery problems in state trial level courts, there are enough recent such cases on the question presented here to reflect the need for a guiding Supreme Court precedent and evincing the reluctance of the trial judges to deal with the federal constitutional question. Diverse results are being reached based on grounds of patient-physician privilege or the trial court's discretionary powers granted under procedural rules. In each instance the trial judges are attempting to apply some sort of balancing test closely akin to the one herein involved. It is obvious that a constitutional precedent is needed and it is respectfully submitted that the instant cause is typical and presents an appropriate vehicle for such a decision.

In *Taylor v. West Penn Hospital*, no. 6087-00206, the Court of Common Pleas of Alleghemy County, Pennsylvania, on August 12, 1987, in a case very like *Rasmussen*, recognized the constitutional issue presented by the blood bank's contention that discovery of the identities of the involved blood donors would violate their right to privacy and adversely affect the societal need for a sufficient supply of volunteer blood donors. The trial judge, however, declined to rule upon this issue but refused the discovery requested under his powers under Rule 4011(b), Pa.R.C.P., to protect the parties by limiting or prohibiting discovery which would cause "unreasonable, annoyance, embarrassment, oppression, expense or burden to the deponent or any other person or party." The Court ruled:

> "We conclude that Plaintiff's discovery request should be denied under Rule 4011(b) because of the chilling

> effect that disclosure of the identities of blood donors would have an ability of the blood bank to obtain a sufficient supply of blood from voluntary blood donors."

In *Krygier v. Airweld, Inc.*, no. 3109/85, by Decision and Order, dated June 25, 1987, the Supreme Court of King's County, New York, refused to require the disclosure of the identities of the blood donors. The trial judge recognized the right to privacy issue under the U.S. Constitution and found that these interests on the donors and the blood bank could be adequately protected either under the New York codification of the patient-physician privilege or by protective order prohibiting the discovery. The trial judge made this latter ground an alternate basis for decision saying:

> "Even if the patient-physician privilege were held to be inapplicable to these facts, the balancing of the competing interests involved in this case clearly favors the moving party and would warrant a protective order under the statutory priciples enunciated in CPLR 3103. The moving party persuasively argued that the disclosure of donor' names would violate the donors' right to privacy. Avoiding the Constitutional analysis, the Court rules that a blood donor's interest in anonymity is protected by CPLR 3103 which provides that the Court may issue a protective order denying the use of any disclosure device "to prevent unreasonable annoyance, . . ., embarrassment, . . . to any person." The blood bank's interest in maintaining the anonymity of their donors together with society's interest in maintaining the anonymity of their donors together with the plaintiff's right to the disclosure of all evidence material and necessary to the prosecution of her suit."

> "Exposing donors to public scrutiny in order to determine what they may have told NYBC has only marginal utility in advancing the plaintiff's theory of liability."

One day later in *Glessner v. Blood Center of Southeastern Wisconsin*, no. 740-451, by Memorandum Decision, dated June 26, 1987, the Circuit Court for Milwaukee County, Wisconsin, declined to follow *Rasmussen* or *Head v. Colloton*, supra, and in purporting to balance the competing interests applied the Wisconsin procedural rule and refused to protect the identity of the blood donor from discovery. The constitutional issue is entirely omitted from the court's discussion of the issues, although considering the cases being discussed this issue surely must have been presented.

The foregoing cases are presented to highlight the critical necessity for a constitutional precedent on the substantial right to privacy question herein presented. It is intolerable for the 14th Amendment right to privacy of a blood donor and attendant national societal interest in fostering and maintaining a viable all volunteer blood supply system to be recognized in Florida and Iowa, protected on privilege or procedural grounds in Pennsylvania and New York and ignored in Texas and Wisconsin. The parameters of the consitutional right of privacy of blood donors should be considered and defined by this Court. A viable national supply of blood and blood products is at stake.

CONCLUSION

For the reasons heretofore stated and discussed it is respectfully submitted that a substantial question of the constitutional right to privacy is presented by this petition and that the privacy interests of the individual blood donors as well as the national societal interest in a healthy and strong volunteer blood donation system require the granting of a writ of certiorari in this cause.

Respectfully submitted,

TIM CURRY
Criminal District Attorney
Tarrant County, Texas

WILLIAM VAN THOMPSON, JR.
Assistant District Attorney
Counsel of Record

Criminal Justice Building
200 West Belknap
Fort Worth, Texas 76196-0201
Tel: 817/334-1233

Attorneys for Petitioner

IN THE DISTRICT COURT
48TH JUDICIAL DISTRICT
TARRANT COUNTY, TEXAS

Cause No. 48-95022-86

BELINDA C. JACKSON, Individually and in Behalf of the Estate of TRISTAINNE O. JACKSON, Deceased

vs.

TARRANT COUNTY HOSPITAL DISTRICT, d/b/a JOHN PETER SMITH HOSPITAL

ORDER

On June 27, 1986, counsel for Plaintiff and Defendant appeared for hearing on Defendant Tarrant County Hospital District's Motion For Protective Order. The Court thereupon considered the argument of the parties and case authorities submitted since the date of hearing. The Court finds that said motion should be sustained in part and overruled in part.

It is therefore Ordered as follows:

a. The objection of Defendant to production of documents (insurance agreements) described in Paragraph 8 of Plaintiffs' Request For Production is sustained. Civil Practice and Remedies Code, Sec. 101.104.

b. The objection to the production of documents (blood donors) described in Paragraph 11 of Plaintiffs' Request For Production is overruled. The definition of "patient" is not sufficiently broad to include a "donor" under the physician-patient privileges and immunities afforded by Article 4495b, Sec. 5.08, Texas Revised Civil Statutes and Rule 509, Texas Rules of Evidence. It is further found that the disclosure of the identity and address of the blood donors does not violate the Constitutional right to privacy, nor does such disclosure

sufficiently threaten institutional and societal interests in maintaining a healthy and effective volunteer blood donation program to warrant an order prohibiting the discovery.

c. The production of documents ordered in Paragraph b shall be made within twenty-one (21) days from the date of signing or, if appealed, the date of affirmance.

d. Plaintiff shall not directly or indirectly contact any "donor" identified through records produced under this order nor undertake further discovery regarding such "donors" until permitted to do so by further order of this Court.

Signed this 16th day of October, 1986.

/s/ William L. Hughes, Jr.
Judge Presiding

IN THE COURT OF APPEALS
FOR THE SECOND APPELLATE DISTRICT OF TEXAS

April 9, 1987

No. 2-86-231-CV

TARRANT COUNTY HOSPITAL DISTRICT, *Relator*

vs.

HON. WILLIAM L. HUGHES, JR., *Respondent*

Opinion by Justice Farris
Concurrence by Justice Lattimore
Dissent by Justice Keltner
(P)

JUDGMENT

On this day came on to be considered the Relator's Petition for Writ of Mandamus filed by Tarrant County Hospital District, Relator v. Honorable Judge William L. Hughes, Jr., Respondent, said Petition for Writ of Mandamus having been filed herein by leave of Court on November 3, 1986, and the same having been duly considered, it is the opinion of this Court that the relief sought by Relator should be denied. It is therefore ordered that the said Petition for Writ of Mandamus be and the same is hereby denied. It is further ordered that Relators pay all costs incurred by reason of this proceeding.

/s/ DFF

IN THE COURT OF APPEALS
FOR THE SECOND APPELLATE DISTRICT OF TEXAS

No. 2-86-231-CV

TARRANT COUNTY HOSPITAL DISTRICT, *Relator*

vs.

HON. WILLIAM L. HUGHES, JR., *Respondent*

ORIGINAL PROCEEDING

WRIT OF MANDAMUS

Relator, Tarrant County Hospital District, seeks the issuance of a writ of mandamus to compel the Hon. William L. Hughes, Jr., Judge of the 48th District Court of Tarrant County, Texas, to rescind his order of October 16, 1986, entered in cause number 48-95022-86, styled Belinda C. Jackson, in behalf of the estate of Tristainne O. Jackson, deceased v. Tarrant County Hospital District, d/b/a John Peter Smith Hospital, which order compels relator as defendant to produce and make available to the plaintiff certain documents identifying blood donors.

We grant relator's motion for leave to file the petition, but deny the relief requested herein.

The cause of action giving rise to the matter in controversy is a suit for wrongful death brought by the plaintiff, individually and in behalf of the estate of the plaintiff's deceased daughter, against the relator. Plaintiff's original petition alleges that the deceased was given blood transfusions by relator which resulted in her contracting Acquired Immune Deficiency Syndrome (AIDS), and in the death of the deceased. Plaintiff accuses relator of failing to exercise the degree of care and the skill and treatment that is ordinarily exercised by and expected of the defendant (medical malprac-

tice) as well as a failure to provide a wholesome blood product (implied warranty). The relator as defendant answered by general denial. Plaintiff served the defendant with a request for production of documents requesting, in relevant part, the production of information pertaining to the names and addresses of blood donors. Relator filed its objection to the production of the information relating to blood donors and sought protective orders of the trial court. The trial court overruled the discovery objection and ordered that the relator disclose the identities and addresses of the blood donors. The court also ordered the plaintiff to not directly or indirectly contact any donor nor undertake further discovery regarding such donors until permitted to do so by further order of the court.

The scope of discovery largely rests within the discretion of the trial court. *Jordan v. Ct. of App. for Fourth Sup. Jud. Dist.*, 701 S.W.2d 644, 648-49 (Tex. 1985). A party opposing discovery bears the burden of establishing a discovery privilege. *Weisel Enterprises, Inc. v. Curry*, 718 S.W.2d 56, 58 (Tex. 1986); *Jordan*, 701 S.W.2d at 649; *Peeples v. Hon. Fourth Supreme Judicial Dist.*, 701 S.W.2d 635, 637 (Tex. 1985).

In its petition for writ of mandamus, relator contends that the order complained of violates TEX. R. EVID. 509, that it violates the blood donors' constitutional right to privacy, and that the societal interest in maintaining a healthy and effective blood donor program clearly overrides any legitimate interest of the plaintiff in the disclosure of the blood donors' identities.

We hold that the physician-patient privilege expressed in TEX. R. EVID. 509 is not applicable. Under rule 509, a "patient" is defined to mean any person who consults or is seen by a physician to receive medical care. A "physician" is defined as a person licensed to practice medicine. Nothing in

the record reflects that the blood donors were seen by a physician or received medical care when they donated blood.

In support of its contentions that the discovery order violates the donor's right to privacy and adversely affects the interest of society in maintaining a healthy and effective blood donor program, relator cites *South Florida Blood Serv. v. Rasmussen*, 467 So.2d 798 (Fla.App. – 3d Dist. 1985);[1] *aff'd*, 500 So.2d 533 (Fla. 1987). Rasmussen received 51 units of blood in the treatment of injuries incurred in an automobile accident. Subsequently, Rasmussen was diagnosed as having AIDS. Rasmussen sued the owner and the operator of the other motor vehicle involved in the accident and served subpoena duces tecum on South Florida Blood Services, Inc., seeking "any and all records, documents, and other material indicating the names and addresses of the blood donors." South Florida Blood Services, not a party to the lawsuit, moved to quash the subpoena on the grounds that Rasmussen had failed to show good cause or justifiable reason for the invasion of the private confidential records of the blood service and its volunteer donors. The majority of the District Court of Appeals of Florida, 3rd District, held that the subpoena violated the donors' privacy interest and society's interest in a strong and healthy volunteer blood donation program and quashed plaintiff's subpoena.

The District Court of Appeals in *Rasmussen* acknowledged that the plaintiff had a legitimate interest in determining the identities of the blood donors because he could recover additional damages from the defendants if it could be shown that his AIDS was caused by blood transfusions necessitated by the injuries he suffered in the automobile accident, but his interest in the information was held slight when compared with the opposing interests. *See South Florida Blood Serv. v.*

[1]A discussion of *Rasmussen* is important to the determination of this case because its facts are uniquely similar to the facts of the instant case.

Rasmussen, 467 So.2d at 801. The District Court of Appeals in *Rasmussen* characterized its decision as one establishing that the Federal and State Constitutions[2] are sources of privacy interest which must be scrutinized when raised in challenge of a discovery order. *Id.* at 803. In arriving at its decision, the District Court of Appeals determined that the blood donors' privacy interests were constitutionally based, that court orders which compel, restrict or prohibit discovery constitute State action subject to constitutional limitations, and that the court would apply a balancing test comparing the interest served by the State action with interests encroached upon by that action. *Id.*

The District Court of Appeals in *Rasmussen* also held that, on the facts of the case, after balancing all interest involved, discovery should not be allowed because the court found a free flow of donated blood of sufficient public importance when combined with the privacy interest of the donors to outweigh Rasmussen's interest in discovering the donors' identity. *Id.* at 804. In support of its conclusion, the court adopted the argument of South Florida Blood Services that because the blood of volunteer donors was less likely to be contaminated with infectious diseases than that of paid donors, the confidentiality of blood service records was essential in order to maintain a voluntary blood donation system sufficient to meet societal demands for blood and blood products. *Id.*

The District Court of Appeals certified to the Florida Supreme Court the following as a question of great public importance:

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[2]Right of privacy. – Every natural person has the right to be let alone and free from governmental intrusion into his private life except as otherwise provided herein. This section shall not be construed to limit the public's right of access to public records and meetings as provided by law. FLA. CONST. art. I, sec. 23.

> Do the privacy interests of volunteer blood donors and a blood service's and society's interest in maintaining a strong volunteer blood donation system outweigh a plaintiff's interest in discovering the names and addresses of the blood donors in the hope that further discovery will provide some evidence that he contracted AIDS from transfusions necessitated by injuries which are the subject of his suit?

The Florida Supreme Court answered the question in the affirmative and approved the decision of the lower court. *See Rasmussen v. South Florida Blood Serv.*, 500 So.2d at 534.

The Supreme Court of Florida acknowledged that the blood donors' rights of privacy are protected by the Federal and Florida Constitutions, but stated that it need not engage in the strict scrutiny mandated by constitutional analysis because it found that the interests involved were adequately protected under Florida discovery rules. *Id.* at 535. The court noted that Florida rules of discovery confer broad discretion on a trial court to protect a party from "annoyance, embarrassment, oppression or undue burden or expense." *Id.* In its opinion, the Supreme Court of Florida discussed the express right of privacy contained in the Florida Constitution and the discussion which preceded its adoption, stating that a principal aim of the provision was to afford individuals some protection against the increasing collection, retention and use of information relating to all facets of individual lives. *Id.* at 536. The Supreme Court concluded that the disclosure sought by Rasmussen implicated constitutionally protected privacy interests. *Id.* at 537. The court also concluded that society's interest in a strong and healthy blood supply would be furthered by denial of the discovery sought by Rasmussen. *Id.* at 538.

Neither the Federal Constitution nor our State Constitution expressly mentions any right of privacy. Detailed discussions

of the recognition of a constitutional right of privacy may be found in *Roe v. Wade*, 410 U.S. 113, 152-53, 93 S.Ct. 705, 726, 35 L.Ed.2d 147 (1973); *Ind. Foundation v. Texas Ind. Acc. Bd.*, 540 S.W.2d 668, 678-80 (Tex. 1976), *cert. denied*, 430 U.S. 931, 97 S.Ct. 1550, 51 L.Ed. 2d 774 (1977); *Ex parte Abell*, 613 S.W.2d 255, 265-69 (Tex. 1981) (Spears, J. dissenting). The term "right of privacy" is a generic term encompassing various rights recognized in decisions of the United States Supreme Court as well as in other federal and state courts. *See* 16B C.J.S. *Right of Privacy* sec. 630 (1985). The right of privacy has been held to protect the right of individuals to make certain decisions, without governmental interference, with regard to highly personal matters, *e.g.*, *Roe v. Wade*. Most privacy cases decided by the United States Supreme Court have involved the rights of individuals to make such autonomous decisions.

A second general area of "right of privacy" protects rights of individuals to prevent unlimited disclosure of personal information, *e.g.*, *Whalen v. Roe*, 429 U.S. 589, 598-600, 97 S.Ct. 869, 875-77, 51 L.Ed.2d 64 (1977). An individual's medical records have been declared to be within a zone of privacy protected by the Federal Constitution. *Id.* at 601, 97 S.Ct. at 877; *G.M.C. v. Director of Nat. Institute*, 636 F.2d 163, 166 (6th Cir. 1980); *United States v. Westinghouse Elec. Corp.*, 638 F.2d 570, 577 (3rd Cir. 1980); *E.I. duPont de Nemours & Co. v. Finklea*, 442 F.Supp. 821, 825 (W.Va. S. Dist. 1977). Although the courts in each of the four cited cases recognized that the right of privacy extends to one's medical records, their opinions are of little comfort to the relator because, in each, the complained of activity was found to not violate the right of the individual. In *Whalen v. Roe*, the Supreme Court reversed a three-judge district court decision holding unconstitutional a State statute requiring the reporting of the names and addresses of all persons who had obtained pre-

scriptions to certain drugs for which there were both a lawful and unlawful market. *Whalen*, 429 U.S. at 592, 97 S.Ct. at 872. The district court had held that the patient identification provisions of the act invaded a doctor-patient relationship which intruded on one of the zones of privacy accorded constitutional protection. *Id.* at 597, 97 S.Ct. at 875. The Supreme Court reversed the district court noting that the State statute provided safeguards against the improper disclosure of the medical records and held that the records did not establish an unconstitutional invasion of any right or liberty protected by the fourteenth amendment.

We disagree with the opinions of the Florida courts and hold that the trial court order compelling relator to identify blood donors is not an impermissible violation of their rights to privacy. We further hold that relator has not established a societal interest that overrides the plaintiff's right to discovery of the blood donors' identities.

In reaching this decision, we have applied a balancing test comparing the interest served by the State action[3] with the donors' interest in privacy. *Nixon v. Administrator of General Services*, 433 U.S. 425, 459, 97 S.Ct. 2777, 2798, 53 L.Ed.2d 867 (1977). The plaintiff's interest in the identity of the blood donors is legitimate. Without the information, it is unlikely the plaintiff will be able to prosecute her cause of action against the relator. The record does not support relator's contention that the blood donors possess a need of anonymity greater than the plaintiff's need. The trial court's order makes an express finding that the disclosure of the identities and addresses of the donors does not violate a constitutional right of privacy. The trial court's order also affords the donors protection from public disclosure by its direction that the "plain-

[3]A court order which compels or restricts pre-trial discovery constitutes State action which is subject to constitutional limitations. *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 104 S.Ct. 2199, 81 L.Ed.2d 17 (1984).

tiff shall not directly or indirectly contact any 'donor' identified through records produced under this order nor undertake further discovery regarding such 'donors' until permitted to do so by further order of this court." The relator has not produced any evidence that would show or tend to show that the information sought by the plaintiff would be used improperly. *duPont*, 442 F.Supp. at 824. The trial court's discovery order includes adequate safeguards against the improper disclosure of the blood donors' identities. *See G.M.C. v. Director of Nat. Institute*, 636 F.2d at 166. In reaching its conclusions, the Florida Supreme Court noted that the discovery rules of that state allow a trial judge, upon good cause shown, to set conditions under which discovery will be given. *See* FLA. R. CIV. P. 1280(c) and that some method could be formulated to verify a blood service's report that none of the donors was a known AIDS victim while preserving the confidentiality of the donors' identity. In a footnote to its opinion, the Supreme Court noted that South Florida Blood Service had stated that none of Rasmussen's 51 donors appeared in a list of identified AIDS victims; however, the court agreed with Rasmussen that he should not have to reply on the Blood Service's statement. *Rasmussen v. South Florida Blood Serv.*, 500 So.2d at 537.

Texas discovery rules also confer broad discretion upon a trial judge to limit discovery to protect any person against or from whom discovery is sought from undue burden, unnecessary expense, harassment or annoyance, or invasion of personal, constitutional or property rights. TEX. R. CIV. P. 166(b)(4). Relator seeks a blanket denial of any discovery of the donors' identities and suggests no conditions limiting the use or publication by the real party in interest of the donors' identities. From the record it appears that the relator has made no effort to determine whether any of its donors have been identified as AIDS victims. Because the trial court's

order evidences a proper concern with protection of the individual's right of privacy, we hold that the record does not establish an invasion of any constitutionally protected right for liberty of the blood donors. *See Whalen*, 429 U.S. at 606-07, 97 S.Ct. at 879-80.

We also hold that the relator has failed to establish that the court ordered discovery is an abuse of discretion because of injury to any societal interest. We agree with the dissenting opinion of Chief Justice Schwartz of the Florida District Court of Appeals that a determination of injury to society's interest by the limited discovery ordered is no less speculative than a determination that the order would benefit society by discouraging blood donations by those infected with AIDS. *South Florida Blood Serv. v. Rasmussen*, 467 So.2d at 806.

For the reasons stated, we deny the relator's prayer for relief.

/s/ David F. Farris,
Justice

EN BANC
OPINION BY FARRIS, J.
JOINED BY SPURLOCK II AND BURDOCK, JJ.
CONCURRENCE BY LATTIMORE, J.
DISSENT BY KELTNER, J.
JOINED BY FENDER, C.J., AND HILL, J.
PUBLISH APRIL 9, 1987

IN THE COURT OF APPEALS
FOR THE SECOND APPELLATE DISTRICT OF TEXAS

No. 2-86-231-CV

TARRANT COUNTY HOSPITAL DISTRICT, *Relator*

vs.

HON. WILLIAM L. HUGHES, JR., *Respondent*

ORIGINAL PROCEEDING

CONCURRING OPINION ON WRIT OF MANDAMUS

I concur with the opinion of Justice Farris. We should not assume the occurrence of the worst eventuality. The trial court has it within its power to prevent the consequences not threatened by the parties, but envisioned by the dissenting opinion.

/s/ Hal M. Lattimore,
Justice

PUBLISH APRIL 9, 1987

IN THE COURT OF APPEALS
FOR THE SECOND APPELLATE DISTRICT OF TEXAS

No. 2-86-231-CV

TARRANT COUNTY HOSPITAL DISTRICT, *Relator*

vs.

HON. WILLIAM L. HUGHES, JR., *Respondent*

ORIGINAL PROCEEDING

DISSENTING OPINION ON WRIT OF MANDAMUS

I respectfully dissent.

This mandamus case comes to us on a sparse record. In fact, we have not been furnished a copy of the discovery requests to which the Hospital District objects. However, all parties candidly admit the source of their disagreement and as a result, we are given enough information to grant leave to file this writ of mandamus.

In reviewing a trial court's actions in a writ of mandamus proceeding, this court cannot substitute its opinion for that of the trial judge. Instead, a writ of mandamus will not issue unless the trial judge clearly abuses his discretion. *Barker v. Dunham*, 551 S.W.2d 41, 42-43 (Tex. 1977). Additionally, the party attempting to exclude information from discovery has the affirmative duty to specifically plead and prove the particular privilege or immunity. *Peeples v. Hon. Fourth Supreme Judicial Dist.*, 701 S.W.2d 635, 637 (Tex. 1985); *Jordan v. Ct. of App. for Fourth Sup. Jud. Dist.*, 701 S.W.2d 644, 649 (Tex. 1985).

The facts of the underlying case are discussed in the majority opinion. As is revealed by Justice Farris' opinion, we are asked to restrict discovery of the identity and location of blood

donors. The defendant's decedent allegedly died of AIDS.[1] The defendant intends to prove that her decedent acquired AIDS through a transfusion of blood carrying the AIDS virus.

The spread of AIDS has been a media event. The hideous results of AIDS combined with the population groups with which it is most commonly associated (homosexual and bisexual men, intravenous drug users), has caused a mass hysteria.[2] In fact, AIDS has been heralded as the "modern day equivalent of leprosy."[3] *Rasmussen v. South Florida Blood Service*, 467 So.2d 798 (Fla.App. – 3d Dist. 1985), *aff'd*, 500 So.2d 533 (Fla. 1987).

As a result, social hostility has extended to AIDS victims, no matter how innocently they have acquired the disease. In addition, members of the "suspect groups" are stigmatized regardless if they are not infected with the disease.[4] As a result, the Hospital District asks us to protect the unnamed donors from intrusions into their medical conditions and private lives.

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[1]Acquired Immunodeficiency Syndrome.

[2]Seventy-three percent of AIDS victims have been identified as homosexual or bisexual men. Seventeen percent have been identified as heterosexual men and women who are frequent intravenous drug users. Landesman, Ginzburg & Weiss "Special Report: The AIDS Epidemic," 312 New Engl. J. Med. 521 (1985). The other ten percent of AIDS cases have been divided among the following groups: Haitians living in the United States; non-drug-abusing individuals with hemophilia; prisoner population groups; central African immigrants to Europe; female sex partners of persons with AIDS; children of mothers who were high risk for AIDS. *See* Gottlieb, Groopman, Weinstein, "The Acquired Immunodeficiency Syndrome" 99 Ann. Intern. Med. 208 (1983); Clumeck, Sonnet, Taelman, "Acquired Immunodeficiency Syndrome In African Patients" 310 New Engl. J. Med. 492 (1984).

[3]At the present time, experts estimate that the mortality rate for AIDS may be as high as forty percent. Blodgett, "Despite the public's hands-off attitude towards AIDS, those who discriminate against the disease's victims are finding no immunity from the law," 12 Student Law. 8 (Jan. 1984).

[4]*See* N.Y. City Commission on Human Rights, "Gay and Lesbian Discrimination Documentation Project" (1984).

PHYSICIAN-PATIENT PRIVILEGE

In my opinion, the Hospital District has not carried its burden in proving that the identity of the blood donors is shielded from discovery because of the physician-patient privilege. The record before us does not contain a statement of facts. Counsel for both the Hospital District and the respondent admit that an evidentiary hearing was not held on the Hospital District's motion for protective order. This failure to produce proof that a physician-patient relationship existed between the Hospital District and blood donors is necessarily fatal to the Hospital's attempt to avoid disclosing the names of the blood donors.

The physician-client privilege did not exist at common law. 8 WIGMORE, EVIDENCE sec. 2380 (McNaughton rev. 1961). However, the privilege is now established by our rules of evidence. TEX. R. EVID. 509. Justification for the privilege is the well-reasoned policy of encouraging the full communications necessary for effective treatment of a patient by a physician. C. McCORMICK, EVIDENCE sec. 72 (3rd ed. 1984). The primary purpose of the privilege is to protect the patient against an invasion of privacy. *Ex parte Abell*, 613 S.W.2d 255, 263 (Tex. 1981). As a result, courts have allowed physicians to assert the privilege on behalf of their patients. *Id.* at 262-63.

It is interesting to note that in a letter brief to the trial judge, the Hospital District contends that the hospital and medical director of the blood bank have the "same duties and responsibilities in regard to a blood donor as they would to any other patient coming under their care." Specifically, the Hospital District contends that the hospital and medical director of the blood bank are required to meet certain standards of care and are obligated to maintain the confidentiality of information collected from the patient in regard to their past and present medical conditions. The Hospital District further points out that the blood collection process is an invasive pro-

cedure which has, "readily observable effects on the donor" and carries the possibility for potential "serious adverse reaction." However, the Hospital District does admit that blood donors may not ever actually see or consult with a physician.

Neither this opinion nor the majority opinion passes on whether these contentions, if proved, would bring the information within the physician-patient privilege. However, it is the burden of the Hospital District to actually prove that a physician-patient privilege existed. This case presents a unique situation for the application of the privilege. Unlike most cases where the privilege is raised, actual testimony may have been the only method in which to prove the application of the privilege. Unfortunately, the trial court was not furnished an adequate basis upon which to decide the issue.

As a result, we cannot hold that the trial court abused its discretion in overruling the Hospital District's motion for protective order and allowing discovery of the identity of blood donors.

RIGHT TO PRIVACY

The Hospital District also claims that the disclosure of the blood donors' identities would violate their right to privacy. Specifically, the Hospital District states, "the only conceivable reason for seeking discovery of the identity and location of these donors is to delve into the medical history and condition of each individual." The Hospital District claims that the information that is likely to be sought by the respondent will include the "intimate details" of the donors' lives, including sexual practices, drug abuse, and medical histories.

The majority opinion discusses the law regarding the constitutional right to privacy. While neither the United States nor the Texas Constitution expressly mention the right to privacy, it has been recognized as a necessary element of individ-

ual freedom. *Whalen v. Roe*, 429 U.S. 589, 598-600, 97 S.Ct. 869, 875-877, 51 L.Ed.2d 64 (1977). However, in a complex society, the total right of privacy is infeasible, particularly where disclosure of information is concerned. *Roe v. Wade*, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973).

When the right to privacy is raised, courts must entertain a two-step process of inquiry. The court must first determine whether the information sought to be disclosed concerns a fundamental right of privacy, i.e., a protected zone of privacy. *Roe v. Wade*, 410 U.S. at 152-53, 93 S.Ct. at 726-27, 35 L.Ed.2d at 176-77; *Ex parte Abell*, 613 S.W.2d 255, 266 (Tex. 1981) (dissenting opinion).[5] If the information sought concerns a fundamental privacy right and thereby falls within a protected zone of privacy, the State must show a compelling interest before invading the zone of privacy. *Roe v. Wade*, 410 U.S. at 155, 93 S.Ct. at 728, 35 L.Ed.2d at 178; *Ex parte Abell*, 613 S.W.2d at 266 (dissenting opinion). On the other hand, if the information does not concern a protected zone of privacy, the court weighs the impact and threat of disclosure against the State interest and disclosure. *Whalen v. Roe*, 429 U.S. at 601, 97 S.Ct. at 877, 51 L.Ed.2d at 75; *Ex parte Abell*, 613 S.W.2d at 266 (dissenting opinion).

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[5]An analogous fact situation to the instant case was presented in the *Abell* case. That case involved patients of a psychologist who brought actions against him because he had sex with them during their psychotherapy. They sought discovery of the names of other patients with whom the psychologist had sexual contact. The majority in *Abell* held that the information was privileged under the provisions of TEX. REV. CIV. STAT. ANN. art. 5561h (Vernon Supp. 1987), *repealed by*, Act of May 17, 1979, ch. 239, 1979 Tex. Gen. Laws 512, 512-515, *amended by* Act of June 19, 1983, ch. 511, secs. 2 and 4, 1983 Tex. Gen. Laws 2970, 2972-73, 2974-75 (presently contained in TEX. R. EVID. 510), and did not discuss the right to privacy issue. However, four justices dissented and discussed the right to privacy claim. (Spears, Campbell, Wallace and Ray). The justices constituting the majority have all left the court.

The dissenting justices with the addition of any one of their colleagues now constitute a majority of the court. As a result, I believe the dissenting opinion casts light on the present thinking of our Supreme Court.

At this writing, only certain activities have been found to fall within the protected zone of privacy. Sexual relations within the marriage fall within such a protected zone. *Loving v. Virginia*, 388 U.S. 1, 87 S.Ct. 1817, 18 L.Ed.2d 1010 (1967). Likewise, contraception, [*Eisenstadt v. Baird*, 405 U.S. 438, 92 S.Ct. 1029, 31 L.Ed.2d 349 (1972)]; abortion, [*Roe v. Wade*, 410 U.S. at 113, 93 S.Ct. at 705, 35 L.Ed.2d at 147]; and procreation, [*Skinner v. Oklahoma*, 316 U.S. 535, 62 S.Ct. 1110, 86 L.Ed. 1655 (1942)] have been held to be within the protected zone of privacy. However, a number of essential activities outside marriage have been held not to involve fundamental areas of privacy. For example, homosexual conduct, [*Bowers v. Hardwick*, ____ U.S. ____, 106 S.Ct. 2841, ____ L.Ed.2d ____(1986)]; adultery, [*McLaughlin v. Florida*, 379 U.S. 184, 85 S.Ct. 283, 13 L.Ed.2d 222 (1964)]; and prostitution, [*Caminetti v. United States*, 242 U.S. 470, 37 S.Ct. 192, 61 L.Ed. 442 (1971)] have been held not to involve protected areas of privacy.

In the instant case, it is impossible to determine which, if any, privacy interests may be invaded. The inquiries made during future discovery will determine that issue. The trial judge wisely decided to prevent the plaintiff from contacting blood donors or conducting further discovery until further order of the court. Obviously, the trial court intends to conduct discovery in the least obtrusive manner possible.

SOCIETAL INTERESTS

The Hospital District also contends that disclosure of the identity of blood donors would harm societal and institutional interests in maintaining a healthy and effective blood donation program. The Hospital District alleges that the public disclosure of blood donor identities would inhibit blood donations in the future. Specifically, the Hospital District argues that society's interest in maintaining an effective blood donation pro-

gram clearly overrides any interest of the plaintiff in the disclosure of the identities of the blood donor. On the other hand, the plaintiff claims there is no other way for her to prove the allegations of her lawsuit.

At the outset, the Hospital District produced no evidence that the blood provided plaintiff's decedent was provided by blood donors rather than sellers.[6] Additionally, the Hospital District produced no evidence regarding the difficulty that local blood banks are encountering in encouraging volunteer donations of blood.[7] No evidence was presented which would tend to demonstrate that the disclosure of the donors' names would be counterproductive to the blood bank program.

Nonetheless, the Hospital District relies on the authority cited in *Rasmussen v. South Florida Blood Serv.*, 500 So.2d 533 (Fla. 1987). The facts of that case are discussed in the majority opinion. The court in *Rasmussen* was faced with a similar situation.[8] In *Rasmussen*, the South Florida Blood Service moved to quash a subpoena and moved for protective order when its records reflecting the identity and location of blood donors were subpoenaed. When the trial court ruled against the blood service, it sought a writ of certiorari to the appellate court which in turn certified the question to the Florida Supreme Court.[9] In *Rasmussen*, the Florida court

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[6]A voluntary blood donation system is encouraged by the United States Government. *See National Blood Policy*, 39 FED.REG. 32701 (Sept. 10, 1974). Voluntary blood donation is highly favored over the selling of blood for the obvious reasons that blood donors are less likely to be contaminated with infectious diseases than those unfortunate individuals forced to sell their blood for subsistence. *Id.*

[7]However, there is no doubt that local blood banks have had difficulty in obtaining blood from volunteers.

[8]The *Rasmussen* court was evidently presented more evidence regarding the effect of the disclosure of the identity of donors. *South Florida Blood Serv. v. Rasmussen*, 467 So.2d 798, 803-04 (Fla.App.–3d Dist. 1985), *aff'd*, 500 So.2d 533 (Fla. 1987). (Court of Appeals opinion).

[9]Florida certiorari practice is similar to mandamus practice in Texas. *Rasmussen*, 467 So.2d at 804. (Court of Appeals opinion.)

concluded that, "society's interest in a strong and healthy blood supply will be furthered by the denial of discovery in this case." *Id.* at 538.

The volunteer blood donation system is crucial to the maintenance of the life and health of the individual members of society. As a result, it is not in the public interest to discourage blood donations by members of the public. The public disclosure of the identity of donors in order to discover if they are infected with the AIDS virus might well discourage donors.

However, we must also protect the plaintiff's right to information necessary to prove her cause of action. In some instances, it is not possible to resolve the conflict between these two competing interests. In those cases, the courts must apply balancing tests to determine whether society's interest outweighs those of a litigant.

However, in this case, it is possible to balance those interests without doing substantial damage to either. The trial court resolved the conflict by allowing discovery, but, denying the plaintiff an opportunity to contact the donors without a further order of the court, stating:

> Defendant shall not directly or indirectly contact any "donor" identified through records produced under this order nor undertake further discovery regarding such "donors" until permitted to do so by further order of this court.

It is obviously the trial court's intention to closely monitor the discovery process to avoid undue publicity and intrusion into the donors' private lives. However, the trial court's order stops one step short of accomplishing the task. The trial court should have further insulated the donors by preventing any party to the litigation from disclosing the donors' names or locations, either directly or indirectly.

The problem with the current order is demonstrated in the *Rasmussen* case. The Florida Supreme Court noted that an order could be designed to both grant discovery and protect donors, stating:

> Some method could be formulated to verify the Blood Service's report that none of the donors is a known AIDS victim while preserving the confidentiality of the donors' identities. However, the subpoena in question gives petitioner access to the names and addresses of the blood donors with no restrictions on their use. There is nothing to prohibit petitioner from conducting an investigation without the knowledge of the persons in question. We cannot ignore, therefore, the consequences of disclosure to nonparties, including the possibility that a donor's coworkers, friends, employers, and others may be queried as to the donor's sexual preferences, drug use, or general life-style.

Rasmussen, 500 So.2d at 537.

In the instant case, the trial court's order does not prevent any party from disclosing the identity of the donors to third parties, including potential witnesses and the news media. I realize this was not the intention of the trial court, and that this court has had the opportunity to review the trial court's decision, made in the heat of a trial schedule, with a relaxed 20/20 hindsight. Additionally, the plaintiff has indicated her understanding of the potential problem.

In her reply to the writ of mandamus, plaintiff has suggested that the list of donors be sealed in the court's record, not be dissiminated to the public, be made available only to the parties in the case, and be destroyed on the final disposition of the case. As mentioned in Justice Lattimore's concurring opinion, the threat of disclosure is not great. However, I cannot agree with his conclusion. While the threat may not be great, the potential harm of disclosure is great. If the names

of the donors are disclosed, it will be too late for the court to act to protect society's interest.

I would grant the writ of mandamus only to the extent of directing the trial court to modify its order to prevent disclosure of the names of the donors, either directly or indirectly to any third person.

/s/ David E. Keltner,
Justice

JOINED BY FENDER, C.J. AND HILL, J.
PUBLISH APRIL 9, 1987

IN THE DISTRICT COURT
48TH JUDICIAL DISTRICT
TARRANT COUNTY, TEXAS

Cause No. 48-95022-86

BELINDA C. JACKSON, INDIVIDUALLY AND IN BEHALF OF THE ESTATE OF TRISTAINNE O. JACKSON, DECEASED

vs.

TARRANT COUNTY HOSPITAL DISTRICT d/b/a JOHN PETER SMITH HOSPITAL and JOHN PETER SMITH HOSPITAL, ET AL

SUPPLEMENTAL ORDER

On October 16, 1986, an Order was signed which, in part, ruled on the production of certain records of Tarrant County Hospital District relating to the identity of donors of blood administered to Tristainne O. Jackson. A Petition For Writ Of Mandamus was filed with the Court Of Appeals for the Second Court Of Appeals District seeking a modification of such order. On April 9, 1987, the Court Of Appeals for the Second Court Of Appeals District issued its Judgment and Opinion denying the Petition For Writ Of Mandamus. The minority opinion expressed apprehension that the Order of October 16, 1986, was not sufficiently restrictive to preclude unnecessary and harmful disclosure of the identity of such "donors." In order to allay the fears expressed in the minority opinion this Court now Orders as follows:

a. All rulings in the Order signed October 16, 1986, are hereby reaffirmed.

b. No one, including but not limited to Counsel and the parties, connected with this litigation shall directly

nor indirectly divulge or allow to be divulged the identity of any "donors," any information about such "donors," or any information regarding such "donors" without specific leave and order of this Court.

c. All information concerning such "donors" shall be kept in a secure place and shall be made available for destruction under the supervision of this Court at the conclusion of this litigation or at such other time as the Court may order.

d. On or before May 8, 1987, each party desiring to do so will submit to the Court in letter form a plan for the future discovery of information relating to such "donors" beyond that now ordered. Such plan should include details for contacting such "donors," discovery directed to such "donors" and/or "testing" of such donors if contact, direct discovery and/or testing is anticipated.

Signed this 14th day of April, 1987.

/s/ William L. Hughes, Jr.
Judge Presiding

IN THE COURT OF APPEALS
FOR THE SECOND APPELLATE DISTRICT OF TEXAS

No. 2-86-231-CV

TARRANT COUNTY HOSPITAL DISTRICT, *Relator*

vs.

HON. WILLIAM L. HUGHES, JR., *Respondent*

ORIGINAL PROCEEDING

OPINION ON MOTION FOR REHEARING

After our original opinions were handed down in this case, Judge Hughes entered a supplemental order relating to the discovery of the identities of blood donors which reaffirmed the restrictions included in the October 16, 1986 order and placed further restrictions on the parties and their attorneys preventing them from disclosing the identities of the donors or contacting the donors without further order of the court.[1] The supplemental order expresses an intent to "allay the fears" contained in the dissenting opinion. In argument on relator's motion for rehearing, before the court sitting en banc, counsel for relator has expressed relator's continued

[1]The specific restrictions added by the supplemental order are as follows:

No one, including but not limited to Counsel and the parties, connected with this litigation shall directly nor indirectly divulge or allow to be divulged the identity of any "donors," any information about such "donors," or any information regarding such "donors" without specific leave and order of this Court.

All information concerning such "donors" shall be kept in a secure place and shall be made available for destruction under the supervision of this Court at the conclusion of this litigation or at such other time as the Court may order.

On or before May 8, 1987, each party desiring to do so will submit to the Court in letter form a plan for the future discovery of information relating to such "donors" beyond that now ordered. Such plan should include details for contacting such "donors," discovery directed to such "donors" and/or "testing" of such donors if contact, direct discovery and/or testing is anticipated.

objection to any discovery of the identities of blood donors despite the additional restrictions placed upon discovery by the trial court. In argument, the attorney for relator has acknowledged that Judge Hughes has not denied relator any requested restrictions on the use or dissemination of the discovered blood donors' identities, and that relator would continue its objection to the discovery regardless of any restrictions which the court might impose.

Mandamus issues only to correct a clear abuse of discretion or the violation of a duty imposed by law when there is no other adequate remedy by law, and we would act in excess of our writ power if we granted mandamus relief absent these circumstances. *Johnson v. Fourth Court of Appeals*, 700 S.W.2d 916, 917 (Tex. 1985).

Relator seeks to have us issue our writ compelling the trial court to withdraw its discovery order. The scope of discovery largely rests within the discretion of the trial court. *Jordan v. Ct. of App. for Fourth Sup. Jud. Dist.*, 701 S.W.2d 644, 648-49 (Tex. 1985). The supplemented order of the court so restricts the discovery of the blood donors' identities as to preclude any risk of disclosure of the identities of the blood donors to third persons. The orders of the trial court with regard to the challenged discovery reflect a well reasoned use of the discretion reserved to trial courts on matters of this sort. The relator's motion for rehearing is overruled.

/s/ David F. Farris,
Justice

EN BANC
PUBLISH AUG. 12, 1987

SUPREME COURT OF TEXAS
P.O. Box 12248
Supreme Court Building
Austin, Texas 78711
Mary M. Wakefield, Clerk

October 7, 1987

Ms. Faye Dance Sheppard
Assistant District Attorney's Office
1500 South Main Street
Fort Worth TX 76104

Lowell E. Dushman
DUSHMAN, FRIEDMAN & BRADY
2620 Airport Freeway
Ft. Worth TX 76111

Mr. Richard Bernays
Touchstone, Bernays, Johnston, Beall and
Smith, 4700 Renaissance Tower
1201 Elm Street
Dallas TX 77002

RE: Case No. C-6771

STYLE: TARRANT COUNTY HOSPITAL DISTRICT
v. THE HONORABLE WILLIAM L. HUGHES, JR., JUDGE ET AL.

Dear Counsel:

Today, the Supreme Court of Texas overruled relator's motion for leave to file petition for writ of mandamus in the above styled case.

Respectfully yours,
Mary M. Wakefield, Clerk
/s/ Barry E. Pickett, Deputy

cc.
Hon. William L. Hughes, Jr.
Judge, 48th District Court
Tarrant County Courthouse
Fort Worth TX 76196

SUPREME COURT OF TEXAS
P.O. Box 12248
Supreme Court Building
Austin, Texas 78711
Mary M. Wakefield, Clerk

November 25, 1987

Ms. Faye Dance Sheppard
Assistant District Attorney's Office
1500 South Main Street
Fort Worth TX 76104

Mr. Lowell E. Dushman
DUSHMAN & FRIEDMAN, P.C.
2620 Airport Freeway
Ft. Worth TX 76111

Mr. Richard Bernays
Touchstone, Bernays, Johnston, Beall and
Smith, 4700 Renaissance Tower
1201 Elm Street
Dallas TX 77002

RE: Case No. C-6771

STYLE: TARRANT COUNTY HOSPITAL DISTRICT
v. THE HONORABLE WILLIAM L. HUGHES, JR., JUDGE ET AL.

Dear Counsel:

Today, the Supreme Court of Texas overruled relator's motion for rehearing of motion for leave to file mandamus in the above referenced case.

Respectfully yours,
Mary M. Wakefield, Clerk

/s/ Blanca E. Morin
Deputy

cc.
Hon. William L. Hughes, Jr.
Judge, 48th District Court
Tarrant County Courthouse
Fort Worth TX 76196

87-1082

Supreme Court, U.S.
FILED
JAN 26 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 871080

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

TARRANT COUNTY HOSPITAL DISTRICT, *Petitioner*

v.

THE HONORABLE WILLIAM L. HUGHES, JR.,
Respondent

Jacksons' Reply to Petition for Writ of Certiorari to the Court of Appeals for the Second Appellate District of Texas

LOWELL E. DUSHMAN
Dushman & Friedman, P.C.
2620 Airport Freeway
Fort Worth, Texas 76111
817/834-8851
Attorney for Ms. Jackson

Fort Worth Brief Printing Co., 610 South Jennings Avenue, Fort Worth, Texas 76104 Phone 817-332-4070

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No. 871080

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

TARRANT COUNTY HOSPITAL DISTRICT, *Petitioner*

v.

THE HONORABLE WILLIAM L. HUGHES, JR.,
Respondent

Jacksons' Reply to Petition for Writ of Certiorari to the Court of Appeals for the Second Appellate District of Texas

TO THE HONORABLE JUSTICES OF THE U.S. SUPREME COURT:

Now comes Belinda Jackson, Individually, and in behalf of the Estate of Tristainne O. Jackson, Deceased, the real parties in interest, and submits this Reply to Petition for Writ of Certiorari to the Court of Appeals for the Second Appellate District of Texas and respectfully urges this Court to deny Petitioner's Writ of Certiorari.

PERSPECTIVE

Blood banks are attempting to immunize themselves or to so minimize their liability that proving the veracity of their conduct would be next to impossible. The blood bank industry is a vital industry to the preservation of life. Blood, however, is not a safe product [see deposition excerpt of Dr. Peter Lazarus, a physician with JPS Hospital, Appendix A-1]. It can

transmit life-threatening, infectious diseases. The standard of care that blood banks use in obtaining blood from voluntary blood donors should not be above scrutiny. Their word should not be inviolate. The veracity of the statements of their personnel, even under oath, should not go unquestioned. Drug companies are subject to scrutiny. Physicians are subject to scrutiny. Manufacturers of life saving medical equipment are subject to scrutiny. It seems that the rights of victims, those that received disease infected blood, have been lost in the shuffle by blood banks' efforts to immunize themselves from accountability. Blood banks realized the seriousness of hepatitis at the time they got legislation passed that struck down implied warranty and strict liability in Texas (see former Article 4590-3, V.C.R.S.), as well as other states. They now realize the seriousness of AIDS infection by transfusion and are trying to head off the troops at the pass. To some extent, they have succeeded in the recent Texas Legislature (70th Legislative Session, Tex. H.B. 1829) whereby names and addresses of donors remain confidential. This case is one of the few "grandfather" types of cases to which the present legislation specifically excepts from such "confidentiality" (Tex. H.B. 1829, Sec. 28). Not only should the rights of victims of transfused AIDS infected blood be put onto the scales of justice but also the total threat to our society that AIDS poses. The true victim is the recipient of the AIDS infected blood. Their life will never again be the same, nor very long. Realistically, we do not live in a society of total chastity. AIDS is a blood and sexually transmitted disease which, once contracted, has no cure now or in the near future.

According to the major findings by Hew Task Force, July, 1983, which is incorporated under the National Blood Policy, 39, Fed. Reg. 32701 (Sept. 10, 1974), approximately 25% of the blood is never transfused due to outdating! If these figures

hold true today, then presently about 4 million units of blood are WASTED annually!

When it comes to the rights of society to safe disease-free blood, the conduct of blood banks must not be held sacrosanct. They must be scrutinized and not immunized.

ARGUMENT AND AUTHORITIES

I.

THE DONOR'S CONSTITUTIONAL RIGHT OF PRIVACY IS NOT INVIOLATE

The donor's right of privacy is not inviolate, particularly in light of the trial court's order and supplemental order.

In 1973, the Texas Supreme Court, in *Billings v. Atkinson*, 489 S.W.2d 853, 859 (Tex. 1973) recognized a broader definition of right to privacy, but specifically limited its application to an *unjustified, unwarranted* invasion of one's private affairs to be *public*. The discovery of witnesses is totally justified and warranted to the administration of justice in this case. Victims have rights. These rights deserve equal consideration, of which only the court system can protect. In our case, blood donor identities will not be made public. Their depositions, if needed, could be taken and their names remain confidential even to the jury. Texas has a substantial interest in seeing that the discovery process permits every person to discover evidence necessary to the presentation of his or her case. *Ex Parte Able*, 613 S.W.2d at 267 (Spears, J., dissenting). Without such a right to discovery, Texas would be unable to provide its citizens a Forum for effective dispute resolution. Ms. Jackson and other innocent citizens need to know the facts surrounding an AIDS death. The invasion into a donor's privacy interest, if one exists, is slight. These donors, however, are key witnesses. The donors are the only people who can relate what actually happened. It is essential to our case to

prove that in all likelihood the decedent's death was the result of AIDS infested transfused blood.

The duty to testify has been regarded as so necessary to the administration of justice that the witness' personal interest and privacy must yield to the public's overriding interest and full disclosure. *United States v. Calandra*, 414 U.S. 338 (1974) (citing *Blair v. United States*, 250 U.S. 273, 281, 1919)).

In *Giffin v. Smith*, 688 S.W.2d 112 (Tex. 1985) the Supreme Court states that "[T]he plain language of Rule 166b thus makes it clear that information concerning the identity and location of persons having knowledge of relevant facts can never be protected from discovery." The persons who donated the blood which was transfused into Tristainne Jackson are persons with knowledge of relevant facts concerning the donor screening procedures utilized by JPS Hospital at the time. JPS Hospital admitted to us a donor has subsequently tested positive, but will not disclose the confirming document with or without the name of the donor. The death certificate issued by JPS shows Decedent died from natural causes [Appendix A-2]. Ms. Jackson's tests for AIDS are negative [see excerpts from deposition of Dr. Peter Lazarus with JPS Hospital, Appendix A-1]. "No man is to be denied the enforcement of his rights merely because another possesses the facts without which the right cannot be ascertained and enforced." *Ex Parte Able*, Id. at 268 (Spears, J., dissenting) (quoting 58 AM Jur, Witness, Sec. 29; 8 Wigmore, Evidence, Sec. 2212). JPS Hospital is fighting hard for the implementation of a privilege to protect itself by diverting society and Ms. Jackson and other innocent citizens from the truth, rather than truly seeking to protect donors from embarrassment. Besides, there is no need to embarrass any donor in this case but merely to review the standard of conduct of JPS Hospital in the total procedures used in screening and/or testing its donors. In *Whalen v. Roe*, 429 U.S. 589, 52 L.Ed. 2d 64, 97 Sup.Ct. 869

(1977), a New York statute required that physicians identify patients obtaining prescription drugs having the potential for abuse by name and address for centralized computer filing. A class action by doctors and patients using these drugs was filed attacking its constitutionality. THEY ARGUED, IN PART, THAT IT INVADED THE PATIENT'S RIGHT OF PRIVACY AND WOULD DISCOURAGE PATIENTS TO USE AND DOCTORS TO PRESCRIBE THE DRUGS. The United States Supreme Court upheld its constitutionality and rejected the right of privacy argument.

The Rhode Island Supreme Court in *Bartlett v. Danti*, 503 A2d 515 (R.I. 1986) held unconstitutional a provision in the confidentiality of health care information act exempting confidential health care information from compulsory legal process. It reasoned that it violated the *guaranteed constitutional right to justice* to all persons by precluding litigants from obtaining and introducing material evidence whereby litigants would be prevented from effectively presenting their claims before a trier of fact.

Justice Spears in his *Ex Parte Able* dissenting opinion, which was joined by Justices Campbell, Ray and Wallace, on p. 266 recognized that the right to privacy is not absolute but instead, "The individual's right of privacy must be weighed against the impact and the threat involved in a state requiring disclosure." See also *Roe v. Wade*, 410 U.S. 113 (1973) at 178.

JPS Hospital keeps discussing public disclosure of very personal and intimate details of the lives of blood donors. The trial court has already shown its determination to give the blood donors adequate protection. I believe that the trial court will prevent harassment of and public disclosure of the donors' personal lives, of which concern I equally share.

II.

SOCIETY HAS AN INTEREST IN A DISEASE-FREE BLOOD SUPPLY

A. Our Jurisdiction has recognized that it is to society's best interest to disclose donor identities, and afford the victim equal access to the Court System.

Our society has a substantial interest in protecting its citizens from diseased blood. Ms. Jackson's request for the identity of the donors does not present an "unwarranted invasion" of the donor's privacy when viewed in light of the public's need for a disease-free blood supply. Negligent blood banks must be held responsible for their acts.

Granting access to the identity of a donor is essential, as I do not wish to rely upon the veracity of any witness for JPS Hospital. Please note that in the *Hoder v. Sayet*, 196 So.2d 205 (Florida, 3rd Dist.Ct.of App.-1967) case Albanese (the donor) testified by deposition that he was asked none of the donor screening questions prior to the taking of his blood by the blood bank. This shows how crucial information can be obtained only by talking to the donors themselves. There is no assurance that various documents kept on donors would not be destroyed, misplaced, or unavailable. Ultimately, the donor may be the only source for critical, unbiased information. The article written by Wyatt, *AIDS, Legal And Ethical Concerns For The Clinical Laboratory*, 4 J.Med.Tec. 108-09 (1987), to some extent is a self-serving article by a medical lab technician.

Our courts have considered the issue of donor confidentiality. Our trial courts have protected donor confidentiality from third persons with appropriate protective orders. Our jurisdiction has weighed the public interest in maintaining a safe disease-free blood supply, and the donor's right of privacy.

There is no evidence that JPS Hospital promised confidentiality to any of its donors in this case. Even if there were, it would not outweigh *the rights of* Ms. Jackson and Decedent, *the victims, to equal access to the court system* with the opportunity for full disclosure.

Some *Rasmussen* differences include the following:

1. Texas Rule 166b specifically provides: "Nothing in this paragraph 3 shall be construed to render non-discoverable the identity and location of . . . any person having knowledge of relevant facts . . . ." An adequate protective order has been entered in our case.

2. Florida has a state constitutional provision granting a state constitutional right to privacy that Texas does not have. Frankly, in my opinion their state constitutional provision is unconstitutional if it would prevent the type of discovery that is sought in this case.

3. The Florida Supreme Court assumed that there would be a prospective inquiry into one's private life and potential association with AIDS. However, we are not concerned with the details of one's private life. We are merely concerned with what screening procedures JPS Hospital did regarding the private lives in "high risk groups." Our trial court will monitor this. The original dissenting opinion of our Texas Court of Appeals in this case points out that the United States Supreme Court has held a number of essential activities outside marriage do not involve fundamental areas of privacy, such as homosexual conduct *Bowers v. Hardwick*, ____ U.S. ____, 106 S.Ct. 2841, ___ L.Ed.2d ____ (1986) and prostitution (*Caminetti v. United States*, 242 U.S. 470, 37 S.Ct. 192, 61 L.Ed. 442 (1971). I would assume drug abuse in this category as well. We have had two trial courts, after both adequately protected the rights of the donors, permit limited discov-

ery. One being the Respondent in our case, Judge William L. Hughes, Jr., and the other being the Honorable Sam Houston, Judge of the 211th District Court of Denton County, Texas, in the *Wadley* case.

The New York trial court, in *Kreiger v. Airweld, Inc.*, No. 3109/85, stated that it did not have to decide the question before it on a constitutional point. In the *Taylor v. West Penn Hospital*, No. GD87-00206, slip. op. (Pa.Ct.Comm.Pleas Aug. 12, 1987) the Court lost sight of several practical considerations.

1. The Court states that the denial of the discovery request does not significantly interfere with Plaintiff's ability to present its best case against the blood bank. However, it is only through liberal discovery that Ms. Jackson has the most significant opportunity to present her best case against the blood bank.

2. It states "the jury's finding will turn on whether the procedures which the blood bank states that it used were reasonable and whether the blood bank followed those stated procedures." This, of course, assumes that each individual who testifies in behalf of the blood bank is totally candid and all appropriate documents have been faithfully produced.

3. "Even if the donor's identity were revealed . . . The blood bank would argue that the donor was either lying to protect himself or that his testimony was not credible." Maybe so, but at least the jury would have the opportunity to weigh the credibility of the evidence.

4. The court on page 19 states "the lawsuit is not the primary deterrent against negligent practices of a blood bank." So what? What about the rights of the victim? Should the blood bank be exempt from review of its negligent practices? What about punitive damages, when

applicable? Any negligent practice of a blood bank is not deterred when they know that their conduct will not be subject to full disclosure. Lab Technicians that run the test on blood products are human and are subject to error like all humans. What if they inadvertently record the wrong result? The only confirming way to denote AIDS transmission would be through donor identification.

B. There is no evidence that the voluntary blood supply will be significantly affected, if at all.

JPS Hospital pursues the argument that disclosure of blood donors will discourage volunteers from donating their blood whereby the volunteer blood system could be destroyed. No real evidence has ever been produced by JPS Hospital or anyone else that would verify that statement. According to the September/October 1986 Lifeline, Bi-monthly News Magazine of the Blood Center at Wadley Blood Center in Dallas, Texas, contrary to confidentiality, it discloses several volunteer donors to-wit: J. A. Summer (a 3-gallon donor), Teresa Dacus, a group picture of donors on page 6, etc. [Appendix A-3]. Wadley is one of the blood centers actively pursuing the "confidentiality" argument. *Wadley Research Institutes, d/b/a The Blood Center at Wadley v. Honorable Sam Houston*, Cause No. 2-87-104-CV. Additionally in *Hutchins v. Blood Services of Montana*, 506 P2d 449 (Mont. 1973), Plaintiff received not only the identity of the donor but also testimony from the donor. The Supreme Court of Montana published the name of the donor, Sharon Holme, on page 451. In the *Hoder* case, Plaintiff received the identity of the blood donor and was allowed to depose the donor. The court disclosed the name of the donor, Albanese. Both *Hutchins* and *Hoder* involved hepatitis contracted through blood transfusions. The blood donors' names that were revealed and testified did not affect the blood supply, volunteer or otherwise. The predecessor statute to the Tex. Civ. Prac. and Rem. Code, Sec. 77.003 was

enacted in 1971. It provided that a blood donor may be sued for negligently donating blood, Article 4590-3, V.T.C.S, and this has not hindered the volunteer blood donor system. According to the National Blood Policy of 1974, 8.8 million units of blood were collected per year. As of 1986, it increased to 12 million units, according to the Money Magazine Article. Contrary to JPS Hospital's assertions, the evidence is overwhelming that the donation of blood has increased. See also Appendix A-4 for an affidavit from Mr. Jack Schwartz, a volunteer blood donor, which was originally attached to my brief before the Texas Supreme Court.

Clearly, JPS Hospital has failed to establish their burden of proof of privilege or immunity regarding the subject discovery at hand. *Weisel Enterprises, Inc. d/b/a Builder's Choice v. The Honorable Peter Michael Curry, Judge, et al*, 718 S.W.2d 56 (Tex. 1986); *Peoples v. Fourth Supreme Judicial District*, 701 S.W2d 635, 637 (Tex. 1985); *McAllen State Bank v. Hon. Homer Salinas*, Cause No. 13-87-316-CV (opinion attached to Appendix, A-5).

C. *Rasmussen* involved unbridled discovery

In *Rasmussen v. South Florida Blood Service*, 500 So.2d 533 (Fla. 1987) is not in point because the blood bank was not even a party to the lawsuit, and Plaintiff sought unbridled discovery without seeking any limitations or restrictions by the trial court, which was specifically pointed out in its decision, and as a part of its argument regarding the potential abuses of unbridled discovery. JPS Hospital has posed the same argument as Florida to a different fact situation. Our case does not seek unbridled discovery. As pointed out by our Texas Court of Appeals, there is no abuse of discretion by our trial court.

D. Blood Business is profitable but not efficient in blood unit preservation

As of 1986, the blood bank industry had become a billion dollar business, according to an article written by Rock, *Inside The Billion-Dollar Business Of Blood*, Money Magazine, 153-172, March 1986. In that article, we also learn that the American Red Cross collects half of the 12 million units of blood that is collected annually. The Blood Services Division of the American Red Cross had a tax free profit of 41.2 million dollars in its fiscal year ending June 30, 1985, before property and equipment acquisitions. Total revenues were more than 466 million dollars. Only two percent of its annual budget was spent on research. The excess revenues were not spent on its own expansion. It received in public donations $17,000,000.00 for a planned research facility in Rockville, Maryland. The surplus went into a balance sheet category called Accumulated Net Assets. [pg. 158 of (Money)]. As previously noted, 25% of blood units collected is wasted. Research money would be well spent on the more efficient handling of blood.

E. "Practical" immunity from litigation encourages blood bank dilatory practices

It is an absolute necessity to make the blood donor industry accountable for their actions. If they are allowed to go, for all practical purposes, unmonitored by society and the Courts, they will move slowly in conquering problems with their blood products. In Money Magazine article, it points out that by 1978 the first AIDS-like virus was suspected and was confirmed positively in 1981 to be AIDS. On December 4, 1982, the Center for Disease Control presented Blood Products Advisory Committee with mounting evidence that AIDS was being spread through the blood supply. No action was taken. On January 14, 1983 the National Hemophilia Foundation asked blood and plasma collectors to adopt screening proce-

dures to discourage donations from high-risk groups, but blood banks continued to accept blood from all donors. It was not until March 4, 1983, when the U.S. Public Health Service announced that high-risk groups should not donate, that the blood banking organizations passed on any information to their members. On March 24, 1983, only some blood banks began to implement screening procedures on donors. Even though there were many recommendations made by the Food and Drug Administration and the Center for Disease Control, the blood banks moved very slowly to control the blood related transmission of the AIDS virus through their product. It was really not until 1985 when the first AIDS antibody test was developed that a unified screening procedure of blood products was instituted by the blood banks. Before 1985, there were other tests available to help identify people with the AIDS virus that could have been instituted to help wean out people that were at high risk for this deadly disease. These tests were the antihepatitis core antibody test, the CMV titer, and helper/suppressor ratio, according to the article written by Samuel, *Infectious Complications of Blood Transfusion*, 11 Seminars In Oncology, 68-76, (1984). Not all had been done by the blood bank industry that was possible to make blood a safer product, until absolutely forced by governmental agencies.

F. Recent Texas Legislation

1. Recent Texas legislation provides that a blood bank may report positive donor blood tests "to the recipient of the blood."

In the 70th Texas Legislative Session, Tex. H.B. 1829, Sec. 9.03(h) states in part that a blood bank may report blood test results to the recipient of the blood, though it does go on to state that identities will not be revealed. This particular legislation is only applicable to lawsuits that are filed after Sep-

tember 1, 1987, see Sec. 28. Our suit was filed before this legislation was to take effect.

2. Blood donation is not a private affair

The *Taylor* case did point out that the likelihood of pursuing litigation against a donor was remote. To that extent I concur with the *Taylor* case. However, the Texas Blood Statute, Sec. 77.003 of the Texas Civil Practice and Remedies Code (formerly Article 4590-3, V.T.C.S.), informs us that blood donation is not a private affair. "[A] person who donates a human body [blood] . . . remains liable for the person's own negligence." By holding donors liable, for their negligence, mandates that the donation of blood is not a private affair. Application of a right of privacy to the disclosure of a blood donor's identity would render Sec. 77.003 meaningless. It is well settled that the intention of the legislature in enacting a statute is the statute itself, and aim and object of construction is to ascertain and *enforce the legislative intent, and not to defeat, nullify, or thwart it. City of Mason v. West Texas Utilities Company*, 237 S.W.2d 273 (Tex. 1951). By enacting Sec. 77.003, the legislature has determined that the identity of donors is discoverable.

III.

PRECEDENT BY THE SUPREME COURT IS NOT NECESSARY

Each Case must be decided on its own facts. The balancing interest must be weighed. In our case, it is obvious that the trial court has closely monitored discovery to avoid *UNDUE* publicity and intrusion into the private lives of donors. Yet, it permits us discovery that will help in proving our case.

The Supreme Court has already established certain guidelines, which have been followed in our case. The Court of Appeals noted that JPS Hospital failed to prove the particular

immunity at issue, which has yet to be proven. The Court of Appeals, based upon the trial court's rulings in this case, carefully explored the constitutional questions presented. No one's rights have been ignored in Texas, only adequately safeguarded.

CONCLUSION

In conclusion, there has been no invasion of the constitutional right to privacy to any blood donor. Societal interest in a safe blood supply and the constitutional right to equal protection, access and justice in the court system for innocent citizens far outweighs any alleged privacy rights of donors. Adequate protection and utmost concern for blood donors has been provided by court order.

If people are discouraged from giving blood that are in the high-risk group for AIDS, the goal of the blood banks has been met to make the blood supply a safer product. Ms. Jackson took both the HTLV-III blood test and the Western Blot test and was cleared of AIDS. We already know that someone out there who gave blood to the deceased has since tested positive as an AIDS carrier. We are entitled to full disclosure of the circumstances surrounding the obtaining of blood by the JPS Hospital Blood Bank.

As necessary and worthwhile as the blood bank industry is, it is also a billion dollar industry that is attempting to discourage anyone from scrutinizing its conduct on a "one on one" basis. Not another person, firm, or company enjoys this luxury.

Respectfully submitted,

DUSHMAN & FRIEDMAN, P.C.
2620 Airport Freeway
Fort Worth, TX 76111
817-834-8851

LOWELL E. DUSHMAN
Bar ID No. 06289000

Counsel of Record and
Attorney for Ms. Jackson

DEPOSITION EXCERPTS OF DR. PETER LAZARUS TAKEN AUGUST 6, 1986

Page 50

Q. Are you aware that Mrs. Jackson, the mother,–
A. I heard she had a negative AIDS test.
Q. Right. Both the HTLV III as well as the Western Blot.
A. I had heard that, yes, sir.

* * *

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Q. Can we agree that blood, though at one point–and certainly is life saving–at the same time at the other end of the sword it can be a dangerous product?
A. Yes.

* * *

STATE OF TEXAS
CERTIFICATE OF DEATH

1. Name of deceased (type or print)
   (a) First TRISTAINNE (b) Middle
   (c) Last JACKSON

2. Sex FEMALE 3. Date of death 12-21-85

6. Date of birth 2-21-83

8a. Place of death–county TARRANT
8b. City or town [if outside city limits, give precinct no.] FORT WORTH
8c. Name of hospital or institution [if not in hospital, give street address] JOHN PETER SMITH

20. Part I Conditions, if any, which gave rise to immediate cause stating the underlying cause last

Immediate cause [enter only one cause per line for (a), (b), (c)]

(a) due to, or as a consequence of: Respiratory Failure

(b) due to, or as a consequence of: Chronic diffuse interstitial lung inflammation

(c) due to, or as a consequence of: [blank]

21. Autopsy? NO

23a. To the best of my knowledge, death occurred at the time, date, and place and due to the cause(s) stated [Signature and title] /s/Peter Lazarus, M.D.

23b. Date signed [mo., day, yr.] 1-10-86
23c. Hour of death 2:59 P.M.
23d. Name of attending physician [type or print] PETER LAZARUS, M.D.

Lifeline
The Bi-Monthly News Magazine of THE BLOOD CENTER at Wadley
September/October 1986 Volume VII Number 5

Page 3 [Picture of donor and Shields]
J. A. Summer, left, a three-gallon donor, donates during the recent 4th of July blood drive as Eddie Shields, Wadley phlebotomist, looks on.

Page 4 [Picture of Ms. Dacus]
Theresa Dacus has donated every 56 days for the past five years! She became a member of the CMV negative "honor roll" more than two years ago.

Page 6 [Group picture of donors]
The Blood Center and The Associates hosted a reception in early June to honor The Associates' gallon and multi-gallon donors. Dorothy DeGuch, front row center, is The Associates' blood drive coordinator.

Page 6 [Picture of student donor]
A happy student donates at the Texas A&M summer blood drive.

IN THE SUPREME COURT OF TEXAS

No. C-6771

TARRANT COUNTY HOSPITAL DISTRICT, *Relator*

v.

THE HONORABLE WILLIAM L. HUGHES, JR., JUDGE, 48TH DISTRICT COURT, *Respondent*

AFFIDAVIT

BEFORE ME, the undersigned authority, personally appeared JACK SCHWARTZ, who under oath stated the following:

"My name is Jack Schwartz. I have given blood on a consistent voluntary basis for 44 years. I have read where AIDS infested blood can be passed to an innocent recipient of a blood transfusion. I have no concern with anyone ever questioning me or taking my testimony under oath regarding my personal background or personal habits in connection with any blood that I have donated. I would still continue to volunteer my blood free of charge. I am in favor of our nation's blood supply being as safe as possible. If questioning of blood donors or scrutinizing blood donors who have furnished blood helps to accomplish this in any way, it's okay with me."

SIGNED this 1st day of November, 1987.

/s/ Jack Schwartz

SUBSCRIBED AND SWORN TO before me this 1st day of November, 1987.

/s/ Dorothy Manuel
Notary Public, State of Texas
Name Printed: Dorothy Manuel
My Commission Expires: 9-19-89

AFFIDAVIT–Solo Page

COURT OF APPEALS
THIRTEENTH JUDICIAL DISTRICT OF TEXAS
CORPUS CHRISTI

No. 13-87-316-CV

McALLEN STATE BANK, RELATOR, *Appellant*,

v.

THE HONORABLE HOMER SALINAS
DISTRICT JUDGE, 92ND JUDICIAL DISTRICT,
Appellee.

On appeal from the 92nd District Court
of Hidalgo County, Texas.

Before Paul W. Nye, C.J.; Robert J. Seerden, and
Fortunato P. Benavides, J.J.

OPINION

In this original mandamus proceeding relator seeks to have this Court issue a writ of mandamus directing respondent to rescind two protective orders and to grant relator's motion to compel discovery. The trial court's orders prohibited discovery of certain evidentiary matters allegedly needed in the prosecution of plaintiff's case and in the defense of a counterclaim asserted by the real parties in interest. We granted the application for leave to file and after the hearing we now grant the issuance of the writ and conditionally order the writ to issue.

McAllen State Bank, the plaintiff and counterdefendant in the cause of action below, is the relator in this action. Rio Grande Bancshares, Incorporated (Bancshares) and individual defendants, the defendants and counter plaintiffs, are the real parties in interest (collectively referred to as defendants).

In 1984 Bancshares purchased all of the outstanding stock of First State Bank of Edinburg. The purchase was financed in part by a $5 million loan from relator, secured by all the outstanding stock of First State Bank. Prior to the execution of a note, incident to the loan, the individual defendants, stockholders of Bancshares, signed a letter agreement in which they promised to maintain a capital-to-assets ratio in First State Bank which would be satisfactory to all banking authorities.

According to relator's allegations, in late 1985, financial problems with First State Bank were discovered by the Texas Banking Department. A meeting with the Banking Department on February 14, 1986, resulted in changes in management of the bank. The Banking Department required First State Bank to submit a plan on how to meet a minimum satisfactory level of capital. Another meeting was held in May of 1986, which included federal and state regulators. Apparently, in response to this meeting, relator notified Bancshares of its acceleration of the indebtedness, and its demand for payment in full of the $5 million loan. On May 23, 1986, First State Bank was closed by the banking authorities.

Relator then filed suit for collection of the note and for breach of the agreement to maintain capital ratios by the individual stockholders of Bancshares. In September of 1986, during a deposition, Rupert Richards, one of the individual stockholders in Bancshares and a defendant in relator's suit, asserted his right to refuse discovery based on a claim of privileged communications with banking officials.

Defendants then filed a motion for a protective order with the Honorable Homer Salinas, Judge of the 92nd District Court, asserting that the information and documents requested were privileged under Tex. Rev. Civ. Stat. Ann.

Art. 342-210 (Vernon Supp. 1987)[1] and therefore not subject to discovery. The motion was heard the next day and respondent issued the first protective order. This order prohibited discovery of the following items:

(1) Information obtained by or furnished to the Banking Department;

(2) Communications, oral or written, between the Banking Department and First State Bank, or Bancshares; and

(3) Records and documents of any nature regarding paragraphs one and two.

In March of 1987 defendants filed a first amended answer and counter-claim. In its counter-claim, Bancshares and the individual stockholders alleged that the capital maintenance agreement, which relator contends provides for the personal liability of the individual stockholders of Bancshares, was not the standard practice in interbank loans made by relator, in contravention of relator's promise to First State Bank that it would use standard loan practices. The answer and the counter-claim also alleged that relator fraudulently hid this fact from the defendants. Eventually, as First State Bank's problems worsened, relator cut off customary short term loans. Bancshare's causes of action were breach of a duty of good faith, wrongful acceleration of the note, fraud, violation of the DTPA, and interference with business relations

[1]This statute has since been amended by Act of June 19, 1987, ch. 973, §1, 1987 Tex. Sess. Law Serv. 6630 (Vernon), which provides in pertinent part:

> [A]ll information obtained, either directly or indirectly, by the Banking Department relative to the financial condition of any bank or bank holding company (state banks) other than call reports and profit and loss statements, whether obtained through examination or otherwise, except published statements, and all files and records of said Department relative thereto shall be confidential, and shall not be disclosed by the Commissioner or any officer or employee of said Department.

(The underlined portions represent the additions and the parenthesis the deletions created by the amendment.)

between Bancshares and the individual defendant stockholders.

As discovery continued, relator attempted to acquire information during depositions of the defendants regarding the management and internal practices followed by First State Bank. The defendants refused to disclose this information. Relator also sought production of minutes of the board of directors of First State Bank from January 1983 to May 1986. In response to these discovery attempts, defendants filed a motion for a second protective order. Defendants claimed that questions relating to the internal management of First State Bank were not relevant to the case and that to permit this discovery would be unnecessarily burdensome. Defendants also asserted that the minutes of the board of directors of First State Bank were privileged under Article 342-210, and that they were not relevant because they contained, almost exclusively, information concerning internal management.

Thereafter, relator filed a motion requesting the court to compel discovery and to reconsider the first protective order. Relator alleged that information regarding the internal management of First State Bank was relevant in that it could lead to discovery of the true cause of the bank's failure. This information would thereby rebut defendants' allegation that relator's failure to provide loans caused the bank's failure. Relator also alleged that the information sought was relevant to their cause of action; specifically, it was relevant on whether the agreement to maintain capital ratios was breached.

Again, a hearing was held after which respondent granted a second protective order preventing discovery by relator of the following:

(1) All information relating to the internal management of First State Bank;

(2) The minutes of the meetings of First State Bank's board of directors; and

(3) Anything related to paragraphs one and two.

Relator now seeks by writ of mandamus to set aside both protective orders and to grant its motion to compel discovery. Relator alleges that the trial court's actions were a clear abuse of discretion in that the proper procedural standards were not met, that the information sought was clearly discoverable ("relevant"), and that the trial judge misinterpreted article 342-210.

Mandamus will not issue unless relator shows a clear abuse of discretion and there is no adequate remedy by appeal. Garcia v. Peeples, 734 S.W.2d 343, 345 (Tex. 1987). A writ of mandamus may issue in a discovery proceeding to correct a clear abuse of discretion by a trial judge. Allen v. Humphreys, 559 S.W.2d 798, 801 (Tex. 1977). This is because of the difficulty in determining harm on appeal, and because of judicial economy. Jampole v. Touchy, 673 S.W.2d 569, 576 (Tex. 1984).

Generally, information will be discoverable if it is reasonably calculated to lead to the discovery of material evidence. However, this broad rule is limited by the rule that the trial court may protect a party from unduly burdensome or expensive discovery, from harassment or annoyance, and from discovery of privileged matters. *Jampole*, 673 S.W.2d at 573; Gordon v. Blackmon, 675 S.W.2d 790, 793 (Tex. App. – Corpus Christi 1984) (original proceeding); Tex. R. Civ. P. 166(b)(a), 166b(4).

Of primary importance in this type of discovery process is that any party who seeks to exclude documents or other evidence from discovery has the affirmative duty to specifically plead the particular privilege, immunity, or exclusion claimed; to request a hearing; and to produce evidence substantiating

the claim. The trial court at this stage of the proceeding should then determine whether an *in camera* inspection is necessary. Peeples v. Fourth Supreme Judicial District, 701 S.W.2d 635, 637 (Tex. 1985).[2] This burden to produce evidence is an onerous one and is squarely and solely on the shoulders of the party seeking to prevent the discovery. *See* Medical Protective Co. v. Glanz, 721 S.W.2d 382 (Tex. App. – Corpus Christi 1986, writ ref'd); Western Casualty and Surety Co. v. Spears, 730 S.W.2d 821 (Tex. App. – San Antonio 1987) (original proceeding); Teran v. Longoria, 703 S.W.2d 300 (Tex. App. – Corpus Christi 1985) (original proceeding). It is an abuse of discretion for the trial court to deny discovery when no evidence is presented substantiating the exclusion or privilege claimed. *Weisel*, 718 S.W.2d at 58.

The record in this cause indicates there was no evidence before the court to establish the claimed privilege and exclusions.

The first protective order was sought solely on the basis that the information requested was privileged under article 342-210. This statute provided in part, "all information obtained by the Banking Department relative to the financial condition of state banks . . . shall be confidential, and shall not be disclosed by the Commissioner or any officer or employee of said Department." The existence and scope of this claimed privilege is not well-defined in Texas case law. However, privileges are not favored in the law and are to be strictly construed. Jordan v. Court of Appeals for the Fourth Supreme Judicial District, 701 S.W.2d 644, 647 (Tex. 1985). Even if this statute were to support the claimed privilege, there was no evidence that the information was "obtained by the Banking

[2]This is so whether the objection is on the grounds of privilege, relevancy or harassment. See Weisel Enterprises, Inc. v. Curry, 718 S.W.2d 56, 58 (Tex. 1986); Independant Insulating Glass/Southwest v. Street, 722 S.W.2d 798, 802 (Tex. App. – Fort Worth 1987) (oringinal proceeding).

Department" and that it was related "to the financial condition of a state bank" During the hearing the judge heard oral arguments by counsel, looked at copies of the statute, copies of cases dealing with the statute and a form or document issued by the Federal Deposit Insurance Corporation. However, there is no indication in the record before us that the judge reviewed any documents, records, or heard any live testimony regarding the applicability of the claimed privilege to the information requested.

Therefore, the proper procedure was not followed in the trial court. The defendants failed to produce evidence supporting the applicability of the purported privilege to the documents and communications.

The second protective order was requested on the grounds that information concerning the internal management was not relevant and that providing this information would be unduly burdensome to produce. It was also claimed that the minutes were privileged and not relevant.

There was no evidence presented that information concerning the internal management was not relevant and how discovery would be unduly burdensome. No live testimony, affidavits or documents were presented to the court substantiating these claims.

Regarding the minutes, there again was no evidence or proof to substantiate the conclusory allegations of Bancshares motion for protective order. There was no live testimony or affidavits, however, certain documents were tendered to the trial court as an exhibit. These documents purportedly were the board minutes and were alleged to be *part* of what the relator was seeking. They were tendered to the court for an *in camera* inspection. It does not appear that the documents were segregated according to the privilege or immunity claimed.

There is no indication in the statement of facts or in the record that the judge conducted an *in camera* inspection. Traditionally, the term "*in camera*" implies that the judge inspects documents in his chambers before a ruling. The judge heard oral arguments throughout the hearing and then ruled on the protective order. No recess was called during the hearing. The trial court's order does not reflect that he considered the documents or reviewed them *in camera* before making his ruling.

Since it appears no *in camera* inspection took place, and no other evidence was produced by the defendants, the trial judge abused his discretion in denying discovery.

Based on relator's argument that the protective orders were granted without the proper procedure being followed, we conditionally grant the writ and hold that the trial court's granting of the protective orders and refusal to grant relator's motion to compel discovery was clearly an abuse of discretion. We are confident that the Honorable Homer Salinas, Judge of the 92nd District Court, will abide by our decision. A writ of mandamus will issue only if he fails to do so.

PAUL W. NYE
Chief Justice

Opinion ordered published.
Tex. R. App. P. 90.

Opinion delivered and filed this
the 29th day of October, 1987.